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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,
Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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BATAVIA, N. Y.

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IN THE

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No. .....

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Vermont entered in the above entitled cause on March 20, 1958 which became final following the denial of petitioner's motion for reargument on March 5, 1958.

Opinions Below

The findings of fact and decision of the trial court, the opinion of the Vermont Supreme Court and its opinion denying reargument are, as yet, unreported (*McKinney* v. *Kelley,* 120 Vt. ___, ___; 139 A(2) ___, ___). Copies

thereof are submitted as a separate Appendix to this petition pursuant to Rule 23, 1, (a) (i). References herein are to page references in this Appendix.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3) (62 Stat. 929) on the ground that the highest state court denied petitioner due process of law in violation of the Fourteenth Amendment and also denied full faith and credit to a final decree of the Connecticut Superior Court and to the statute and case law of that state in violation of Article IV, Section 1 of the Federal Constitution and 28 U. S. Code, Section 1738 (62 Stat. 947).

The final judgment of the Vermont Supreme Court sought to be reviewed is dated and was entered on March 20, 1958. The judgment recites that the judgment of the Rutland County Court (entered August 2, 1957) was affirmed on November 5, 1957, that petitioner's motion for reargument was denied on March 5, 1958 and that the Vermont Supreme Court issued its stay of the mandate on March 14, 1958 (pp. 16-19 *infra*).

Questions Presented For Review

1. Whether the highest Vermont court, by refusing to accept petitioner's uncontradicted, corroborated, competent and credible evidence establishing numerous substantial changes of circumstances since the 1953 custody decree which required its modification, denied petitioner due process of law;
2. Whether such court denied full faith and credit to the 1956 Connecticut decree which determined that re-

spondent's former paramour and present husband was unfit to have custody of his own three children;

3. Whether such court denied full faith and credit to the statute and case law of Connecticut establishing respondent's continued misconduct there subsequent to the 1953 Vermont custody decree;
4. Whether the Vermont decision is in conflict with the decisions of other state courts of last resort on a matter of public importance, namely, that the divorced wife's continued misconduct with and remarriage to the man who broke up the home constitute changes of circumstances requiring a change of custody from her to the child's innocent father.

Statutes and Constitutional Provisions Involved

The due process and full faith and credit clauses of the Constitution of the United States; 28 U. S. C. Sections 1257(3) and 1738; Connecticut G. S. (1949 revision) Sections 8545 and 8553; Vermont Statutes (1947 revision) Section 3252 (Appendix, pp. 32-33).

Statement of the Facts

The parties were married in New York, July 12, 1940 and had two children: Denman, born January 31, 1942, and Kirk, born October 27, 1944 (3). In 1945 they moved to Vermont where petitioner employed one Kay Francis Kelley in his business of raising small animals for laboratory purposes (3). In October 1950 respondent and Kelley went to New York together where they spent the night in a motel or cabin (4). On their return petitioner accused respondent of infidelity whereupon she left him in November, 1950, taking the infant Kirk with her first to New

York City and then to Detroit (4, 5). In September 1951 she left the child for a time in Detroit and rejoined Kelley in Connecticut (5). Petitioner thereupon sued her for a divorce in the County Court for Rutland County, Vermont, alleging both adultery and "intolerable severity" (5). When the libel was served on respondent, after midnight on January 24, 1952 in her apartment at Glastonbury, Connecticut, she and Kelley were found partially disrobed and during that month he was a nightly visitor there between the hours of midnight and 3:00 or 4:00 A. M. (7). These circumstances established adultery under both Connecticut (*Zeiner* v. *Zeiner*, 120 Conn. 161, 165) and Vermont law (*Raymond* v. *Raymond*, 120 Vt. 87). On June 28, 1952 Kelley finally deserted his own wife, Laura, and their three children, born in 1946, 1949 and 1951 respectively (7). She thereupon returned to her parents in Massachusetts with the children.

Trial of the contested Vermont divorce action, wherein respondent appeared generally by attorney, resulted in a decree on February 3, 1953 granting petitioner a divorce on the ground of "intolerable severity" (the adultery charge having been withdrawn in petitioner's then hope of a reconciliation), awarding respondent custody of Kirk, subject to reasonable visitation by petitioner, but denying her all alimony and counsel fees (5, 6). Petitioner has since complied fully with the provisions for Kirk's support (6), but has been refused his visitation rights by respondent who has since kept the child in Connecticut.

Petitioner visited respondent in Connecticut in the summer of 1953 (7) in hope of a reconciliation but learned from her that she was continuing her illicit relationship with Kelley, allegedly on the advice of a Hartford physician. The child was then badly cared for and in need of

clothing which petitioner provided. In December 1954 respondent removed him from Glastonbury, refusing to disclose his whereabouts to petitioner's investigator. On November 8, 1955 Kelley sued his wife, Laura, in the Connecticut Superior Court for Hartford County for a divorce, alleging "desertion", but when she filed a cross complaint on December 8, 1955 alleging his desertion of her and their three children on June 28, 1952, *supra*, Kelley withdrew his complaint and, on May 29, 1956, a final decree was entered in the Connecticut court, after a hearing on the cross complaint, awarding Laura a divorce, custody of their three children and directing Kelley to pay her $27.00 weekly for their support from his earnings of about $90.00 (7, 8, 9).

In June, 1956 Kelley lived with respondent in her apartment (then in East Hartford, Connecticut) and his own room nearby was unused. Despite the foregoing respondent married him on September 21, 1956 (8), again secreting Kirk from petitioner's investigator at Christmas in 1956. They were finally located in 1957 on a remote lake, 28 miles from East Hartford where Kelley and respondent are now employed, leaving the child, Kirk, "more or less" unattended during the day (9). Kirk now refers to Kelley as his "father" and to his only brother, Denman, who resides in Vermont with petitioner and his family in a very substantial home, as a "dummy" (9, 10).

On ascertaining these subsequent changes in circumstances petitioner, on January 7, 1957, instituted this proceeding under Vermont Statutes, Section 3252, for a modification of the 1953 custody decree and the award of Kirk's custody to him (12). The summons and petition were personally served on respondent in Connecticut, her

Vermont attorney and also her counsel then withdrew from the cause by leave of court, it was adjourned to enable her to procure new counsel and she thereupon wrote the court that she did not care to appear and defend, even though Connecticut would recognize and enforce a Vermont modification decree (2, 12) (*Freund* v. *Burns,* 131 Conn. 380; *Morrill* v. *Morrill,* 83 Conn. 479, 492)[1] Petitioner's undisputed evidence was finally presented on June 18, 1957, findings were made by the Vermont County Court on July 17, 1957 and his petition dismissed by a "judgment order" entered in that court on August 2, 1957.

On review by bill of exceptions to the Vermont Supreme Court, the highest state court, petitioner specifically excepted to the trial court's refusal to find, as requested, that Kelley had deserted his own family in 1952 on the ground that this had been determined by the prior Connecticut decree, which was entitled to full faith and credit under the Federal Constitution[2]. Petitioner likewise excepted to the refusal to find and apply the Connecticut law establishing respondent's continuing offenses of adultery and fornication there (Conn. G. S. Secs. 8545, 8553), also to the refusal to find, although established by undisputed evidence: respondent's present unfitness as custodian, the substantial changes in circumstances since the 1953 Vermont decree requiring a modification of its custody provisions in petitioner's favor, the alienation of the child by his new stepfather, the latter's adjudicated unfitness to be custodian of his own children, respondent's denial of petitioner's visitation rights under the 1953 decree, substantial

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[1] See *Halvey* v. *Halvey,* 330 U. S. 610, 621, note 8; *Restatement: Conflict of Laws,* Sec. 147.

[2] An exemplified copy of the Connecticut judgment roll was received in evidence (8) (*Kelley* v. *Kelley,* No. 104, 446-J, Conn. Supr. Ct., Hartford Co., Petr's Ex. 3).

changes in the conditions of the parties since that date and numerous other facts establishing beyond peradventure that the child's welfare would now best be served in petitioner's custody.

In affirming the judgment order of August 2, 1957 the highest state court summarily declined to review *all* of petitioner's twenty one briefed requests for these findings that had been refused below, noting that petitioner "has worked with a very fine brush, indeed" (16). Although the settled Vermont rule heretofore was that the statements of a credible witness are not to be arbitrarily disregarded or ignored, that when he testifies distinctly and positively on a fact, is not contradicted and there is no circumstance from which a contrary inference may be drawn, *that fact may be taken as established (Granite Creamery Co.* v. *Cheese Co.,* 115 Vt. 408, 413; *Brown* v. *Maryland Casualty Co.,* 111 Vt. 30, 35; *La Pierre* v. *Halpin,* 111 Vt. 193, 196; *Valenti* v. *Imperial Assurance Co.,* 107 Vt. 65, 69; *Neill* v. *Ward,* 103 Vt. 117, 160), all this was overturned by the state court holding here that petitioner's undisputed and corroborated evidence could be wholly disregarded; further, that such novel holding "has particular force and application to the hearing had here where only one side was represented and there was no one to challenge any particular assertion" (22) (cf. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 331 *contra*). The case cited by the state court to support this extraordinary proposition (22) (*Miller* v. *Miller,* 89 Vt. 547, 549) on its face has no application to this situation but merely authorized discard of the testimony of a single witness who testifies two ways. That was not this case.

Petitioner could not anticipate this unprecedented action of the highest state court, contrary to its own prior deci-

sions *supra* (*Saunders* v. *Shaw*, 244 U. S. 317, 320). He thereupon seasonably raised the Federal Constitutional question of denial of due process by petition for rehearing (motion for reargument) (25). The state court then squarely ruled on this claimed denial of a federal right, holding that there had been no "arbitrary disregard" of petitioner's evidence and that there was "no merit" in his claim of a "plain denial of the right guaranteed petitioner by the Fourteenth Amendment to the United States Constitution" (30). The question thus is now open for review by this Court (*Staub* v. *City of Baxley*, 355 U. S. 313, 318-19 and cases cited, No. 48 October Term, 1957; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Kansas City So. Ry. Co.* v. *Albers Comm. Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 665, 668).

Statement Under Rule 23, 1(f)

The federal question of denial of due process was seasonably raised, at the earliest opportunity, on petition for rehearing; it was considered and then denied by the highest state court. The federal question of denial of full faith and credit to the Connecticut decree was specifically raised on that ground by exception (No. 9 in the trial court) to the refusal to find the facts plainly established by that decree (Request No. 8). On appeal this exception to the refusal to find as requested was summarily dismissed on the ground the requested finding was "multiple in character" and also that it was "embedded in other elements which the requesting party is not entitled to have found" (16, 17). This is not so. The federal question of denial of full faith and credit to the cited Connecticut statute and case law was seasonably raised by exception (Nos. 25, 27)

in the trial court and wholly ignored by the state Supreme Court on appeal, although, under Vermont law, foreign law may be judicially noticed there (*Cukor* v. *Cukor,* 114 Vt. 456, 462).

The refusal to find facts established by the Connecticut decree on the ground that this request was "multiple" and contained elements which petitioner was "not entitled to have found" was a plain defiance of the full faith and credit clause and 28 U. S. C. Section 1738 (cf. *Cook* v. *Cook,* 342 U. S. 126, 128). The state court has decided these federal questions of substance in a way not in accord with the applicable decisions *infra* of this Court.

Reasons for Allowance of the Writ

This is not a "mere contest of property rights between two parties" (30) but a matter of human rights involving the welfare, education and upbringing—indeed the whole future—of a thirteen year old boy and future citizen (cf. *May* v. *Anderson,* 345 U. S. 528, 541). In that connection it was elementary to due process that petitioner was entitled to have his entire evidence fully and fairly considered (*Lispena* v. *California,* 314 U. S. 219, 236; *Georgia Ry. & El. Co.* v. *Decatur,* 295 U. S. 165, 171 and cases cited). The state court's refusal to find facts established by this undisputed proof which, if found, would require a transfer of custody to petitioner, presents questions for review by this court (*Barsky* v. *Board of Regents,* 347 U. S. 442, 454; *The E. A. Packer,* 140 U. S. 360, 365; *The City of New York,* 147 U. S. 72, 77).

In view of the importance to the state that its future citizens be clothed, nourished and suitably educated, considerations assumed by all civilized countries, it comes as

a surprise that any state "should, either by statute or judicial decree, so tie its own hands as to foreclose all future inquiry into the duty of maintenance, however affected by changed conditions" (*Yarborough* v. *Yarborough,* 290 U. S. 202, 220, 222). Accordingly it has been uniformly held throughout this nation that the wife's continued misconduct with her paramour subsequent to the divorce and her eventual marriage to the very man who broke up the home is a change of circumstances requiring a change of custody of the child to his innocent father (*Harbour* v. *Harbour,* 48 CA (2) 131, 119 P(2) 394; *Phillips* v. *Christensen,* 121 Col. 380, 216 P(2) 659; *Sherwood* v. *Sherwood,* 56 Ia. 608, 10 N. W. 98; *Serotzke* v. *Serotzke,* 335 Ill. A. 485, 82 N. E. (2) 375; *Johnson* v. *Fish,* 197 S. W. (2) 990 (Mo A.); *Watkins* v. *Watkins,* 230 S. W. (2) 778 (Mo. A.); *Pangle* v. *Pangle,* 134 Md. 166, 106 A. 337; *Neal* v. *Medcalf,* 244 S. W. (2) 666 (Tex. CA); *Conley* v. *St. Jacques,* 110 S. W. (2) 1238 (Tex. CA); *Allen* v. *Allen,* 38 Wash. (2) 128, 228 P(2) 151 (Wash.). This settled rule was dismissed by the highest Vermont court as "obscured by a spirit of retribution" (23). But certiorari will be granted to resolve a conflict between state courts of last resort (*Illinois* v. *United States,* 328 U. S. 8, 9).[3] The question is one of substantial public interest in which some uniformity among the states obviously is desirable and necessary (cf. *Halvey* v. *Halvey, supra,* 330 U. S. 610).

A federal right of due process is denied by the making of findings of fact without support in the evidence (*Creswell* v. *Knights of Pythias,* 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-5). Here neither respondent nor the child were before the Vermont

[3] See also: Stern and Gressman: Supreme Court Practice (1950) p. 124.

court (cf. *Halvey* v. *Halvey, supra,* 330 U. S. 610, 613) consequently its finding that Kirk is now "happy, contented and well cared for in his present home" in Connecticut (11) is the very surmise, speculation and conjecture which Vermont herself previously had strongly condemned (*Raithel* v. *Hall,* 99 Vt. 65, 72; *Valiquette* v. *Smith,* 108 Vt. 128; *Avery* v. *Bender,* 119 Vt. 313, 331; cf. *Barsky v. Board of Regents, supra,* 347 U. S. 442, 454). On appeal the highest state court speculated further that the trial court "may well have considered" petitioner's lack of "superiority of character" (23) although the *only* evidence was that both his character and reputation were exemplary and that respondent's were not. On the reargument motion the state court then attempted to justify this entire disregard of petitioner's undisputed evidence by holding that it must be "weighed" in the light of his alleged "delay" (29)—from entry of the custody decree on February 3, 1953 to commencement of this modification proceeding on January 7, 1957 on the ground of the very changed circumstances *supra* which had taken place in that interim! The undisputed proof[4] was that petitioner consented to respondent's custody in 1953 on advice of local counsel in the unrealized hope of a reconciliation; that he thereafter sought her out in Connecticut only to learn that she was continuing her adulterous life with Kelley; that she concealed the child's whereabouts in Connecticut at Christmas in 1954 and again in 1956; that in 1956 Kelley was adjudicated by the Connecticut court to have deserted his own wife and three small children and denied their custody; that notwithstanding and despite religious differences respondent thereafter married him, although he had

[4] Since the facts are undisputed this court is at liberty to inquire whether they support the judgment (*Kelley* v. *Rhoads,* 188 U. S. 1, 5).

then broken up two homes and deserted his own family; that respondent has now exhausted her own resources and is obliged to leave the child unattended for her remote daily employment at $50 weekly, whereas petitioner's circumstances have now materially improved; that the unfit step parent, Kelley, has now alienated the child from his own father who has been denied even his legal right of visitation in a foreign jurisdiction. On this evidence the denial of petitioner's federal right to due process by the state court is plain, irrespective of whether it be concealed under an unsupported general assumption as to the child's present welfare or "economic security", petitioner's alleged lack of "superiority of character", his alleged "delay" in waiting to establish these substantial changes of circumstances until after they had actually occurred, or a claimed lack of authority to review a clear abuse of "discretion" by the trial court (cf. *contra, Dye* v. *Lalor*, 94 Vt. 103, 116; *Schlitz* v. *Lowell Mut. F. Ins. Co.*, 96 Vt. 337, 342; *Temple* v. *Atwood*, 99 Vt. 434, 435).[5] But the assertion of federal rights "is not to be defeated under the name of local practice" (*Davis* v. *Weschler*, 263 U. S. 22, 24; *Barsky* v. *Board of Regents, supra*, 347 U. S. 442, 469-70; *Staub* v. *City of Baxley, supra*, 355 U. S. 313, 319). If more proof was desired on any of these matters, so important to the infant's welfare, a remand was specifically requested "to prevent a failure of justice" (*Brown* v. *Maryland Casualty Co., supra*, 111 Vt. 30, 37; *Shea* v. *Pilette*, 108 Vt. 446, 455) however this too was summarily refused (31). Although now expressing doubts as to petitioner's "economic security" the state court flatly declined a remand to satisfy

[5] "If discretion was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable, there was an abuse" (*Dye* v. *Lalor, supra*).

them "to prevent a failure of justice" (cf. *Saunders* v. *Shaw, supra,* 244 U. S. 317, 319).

"It is the essence of all law that when facts are the same the result is the same" (*Hubbard* v. *Hubbard,* 77 Vt. 73, 77). Petitioner was entitled to the equal protection of the laws. Yet exactly the opposite result was reached here when the opinion below is compared with the contemporary decision of the same court (by the same justice) in *Raymond* v. *Raymond, supra,* 120 Vt. 87. Before this conflict[6] was reported the state court concluded the instant case *might* well have gone in petitioner's favor had it heard the evidence in the first instance (citing *Temple* v. *Atwood, supra,* 99 Vt. 434, 435); that there *was* evidence upholding petitioner's contentions; that such evidence *did* "indicate" respondent's adultery and that Kelley "broke up" petitioner's home (23). But when the conflict with *Raymond* was urged as a ground for reargument the state court then emphasized that there was no actual finding of adultery here, that petitioner's "delay" *supra,* justified the disregard of his evidence and that the child's "economic security" now lay with the respondent (26), despite her established reverses and moral unfitness.

Petitioner was entitled to a judicial judgment on the facts and law (*United Gas Co.* v. *Texas,* 303 U. S. 133, 139). Vermont's control over her court proceedings is subject to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution (*Twining* v. *New Jersey,* 291 U. S. 78, 101; *West* v. *Louisiana,* 194 U. S. 258, 263). "For history proved that judges too were

[6] The conflict between the two decisions was set forth in detail in the reargument motion as soon as its existence became known.

sometimes tyrants'' (*Poulos* v. *New Hampshire,* 345 U. S. 395, 426). This court consequently is not bound by state court findings but may determine for itself the facts upon which the asserted federal right depends (*So. Pac. Co.* v. *Arizona,* 325 U. S. 761, 771; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659 and cases cited). Here there was no evidence that the child's ''economic'' or other welfare lay with respondent—indeed all the undisputed proof was precisely to the contrary. Respondent's refusal to appear and produce evidence was but an admission of the want of merit in her defense (*Hammond Packing Co.* v. *Arkansas, supra,* 212 U. S. 322, 331). The Vermont court's action in formulating and enforcing a contrary substantive rule of law has resulted in a denial of due process to this petitioner, even though there was procedural due process (*Shelley* v. *Kramer,* 334 U. S. 1, 17).

No considerations of Vermont local law or public policy can impair the full force and effect required to be given to the Connecticut judgment (*Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 438-9) and it is immaterial, in that connection, that the judgment was entered on a default (*Morris* v. *Jones,* 329 U. S. 545). On the contrary, it is significant that Kelley, like respondent, although represented by counsel, chose not to defend in Connecticut. If there is to be a full faith and credit clause it follows that a father who has been adjudged an unfit custodian for his own three children in Connecticut cannot thereafter be adjudged in Vermont to be a desirable stepfather and custodian of another's child, to the exclusion of that child's own father and natural guardian who, in this instance, is this petitioner and without blame. Certiorari should be granted to resolve this important problem (*Halvey* v. *Hal-*

vey, supra, 330 U. S. 610, 612, 617; cf. *Adam* v. *Saenger,* 303 U. S. 59, 64).

These federal questions have been properly raised (*Lispena* v. *California, supra,* 314 U. S. 219, 221; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 349, 366-7; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164; *Brinkerhoff-Faris Tr. & Sav. Co.* v. *Hill,* 281 U. S. 673, 678; *Saunders* v. *Shaw, supra,* 244 U. S. 317, 320). This court is justified in searching this record to determine whether the crucial finding by the state court that respondent is a fit custodian has a reasonable basis in the evidence (*Plumbers Union* v. *Graham,* 345 U. S. 192, 197).

Conclusion

For the reasons above stated it is respectfully requested that this Petition for a Writ of Certiorari should be granted.

March 31, 1958.

ALBERT G. AVERY,
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New York 5, N. Y.,
Counsel for Petitioner.

Final Judgment of Vermont Supreme Court

State of Vermont,
Washington County. } ss.:

Pleas, Before the Honorable the Supreme Court, at a General Term thereof, begun and held for the County of Rutlant, at Montpelier, in the County of Washington, on the first Tuesday of September, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and fifty-seven:

Present: The Hon. Olin M. Jeffords,
Chief Justice.

The Hon. Walter H. Cleary,
The Hon. Charles B. Adams,
The Hon. Benjamin N. Hulburd,
The Hon. James S. Holden,
Associate Justices.

Officers of the Court,
Norman E. Peduzzi, Clerk of the General Term.
George N. Harman, Clerk of the Supreme Court for the County of Rutland.

On which day said Court was opened and continued its session from day to day for the disposition of causes, until the 12th day of September, A. D. 1957, at 11:10 A. M., when the same was adjourned without day.

Attest: NORMAN E. PEDUZZI,
Clerk.

STATE OF VERMONT
Supreme Court, Rutland County

September Term, 1957.

NORTON D. MCKINNEY,

v.

GEORGIA H. MCKINNEY (KELLEY).

Docket No. 1085

BE IT REMEMBERED, that at a General Term thereof of said Supreme Court begun and held at Montpelier on the 5th day of September, A. D. 1957, Norton D. McKinney, petitioner, then of Middletown Springs, in the County of Rutland, comes by his attorneys, Lawrence C. Jones and Albert G. Avery, and brings his petition on appeal from the Rutland County Court, the same being a proceeding under Section 3252 of the Vermont Statutes, Revision of 1947, to vary the custody of one infant, Kirk McKinney, to the petitionee, on the ground of changed circumstances, to which order and decree in the said County Court of Rutland County the petitioner seasonably took and was allowed his exceptions to this Court.

And at Montpelier in the County of Washington on said 5th day of September, the petitioner being fully heard on the libellant's exceptions, *ex parte;* and because the justices of this court will advise themselves upon the premises before they give judgment thereon, a day thereof is given until the next stated General Term of this court, begun and held at Montpelier aforesaid on the first Tuesday of November, 1957, being the 5th day of said month.

And now at the term of this court, last aforesaid, at Montpelier, again comes the petitioner, Norton D. McKinney, by his said respective attorneys.

WHEREUPON, it is CONSIDERED AND ADJUDGED BY THE COURT that the judgment of the county court is affirmed.

And on November 18, 1957, in accordance with the provisions of the rules of this court, and before certification thereof, the petitioner seasonably filed his motion for re-argument in said cause, and on December 20, 1957, his supplement to the said motion for re-argument, the same being heard, *ex parte,* at the next stated General Term of this court, begun and held at Montpelier, aforesaid, on the first Tuesday, 1958, to wit, January 7.

And at the next stated General Term of this Court, begun and held at Montpelier on the first Wednesday of March, 1958, to wit, March 5, it is CONSIDERED AND ADJUDGED BY THE COURT, that the motion for re-argument is denied, let the full entry go down.

And before certification of the final judgment of the said Vermont Supreme Court of March 5, 1958, the petitioner seasonably filed his motion on March 14, 1958 for a stay of the mandate in said cause, which motion was by the court granted and certification of said final judgment of March 5th stayed.

Done by order of said court at the City of Montpelier, in the County of Washington, this 20th day of March, A. D. 1958.

NORMAN E. PEDUZZI,
Clerk.

SUPREME COURT.

State of Vermont, }
Washington County. } ss.:

I, NORMAN E. PEDUZZI, Clerk of the General Term of the Vermont Supreme Court do hereby certify that the annexed and foregoing is a true copy of the original placita for the September Term, A. D. 1957 of the Supreme Court, and of the record of judgment of the March Term, A. D. 1958 of the Supreme Court, in the cause therein entitled, and of the whole of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Montpelier, in the County of Washington, this 20th day of March, A. D. 1958.

NORMAN E. PEDUZZI,
Clerk.

(SEAL)